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No. 9682

IN THE  
United States Circuit Court of Appeals  
For the Ninth Circuit

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ADOLPH B. SPRECKELS,

*Petitioner,*

VS.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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PETITIONER'S REPLY BRIEF.

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**PETITIONER'S REPLY BRIEF.**

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Respondent first contends that the decision of the Board should be upheld, not upon the grounds assigned in the Board's opinion, but for the reason that petitioner is not entitled to a deduction for broker's selling commissions as a business expense in any event, referring to his brief in Commissioner v. Spreckels, No. 9687 in this Court. Petitioner's answer to that contention will likewise be found in his brief in that proceeding.

As to the question presented in petitioner's opening brief, viz.: the proper determination of the refund allowable on a timely refund claim, it is evident, from a reading of the brief for respondent, that the parties are in accord as to the law and facts and that the

only problem before the Court is the application of the former to the latter.

We start with the premise that, on the record, petitioner has overpaid his income tax for the year 1934 in the sum of \$15,122.56 and that he made a timely and valid refund claim for \$4,087.61. Petitioner claims he should recover the amount covered by the claim. Respondent contends the recovery is limited to \$2,816.72 as determined by the Board.

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**APPLICATION OF G. C. M. 9800 REQUIRES REFUND OF FULL  
AMOUNT COVERED BY PETITIONER'S REFUND CLAIM.**

Let us consider the problems presented in G. C. M. 9800, X-2 Cumulative Bulletin 271 and then substitute the facts of the present case and note the result. Two years were involved in the memorandum, 1923 and 1925.

“The items in question are as follows:

	“1923.	xdollars
Net income as previously adjusted.....		83.60
Add: (1) Decrease in allowance of deduction for British taxes .....		27.01
		110.61
Deduct:		xdollars
(2) Head office expenses allowed...		72.48
(3) Additional depreciation allowed		.92
(4) Increase in reserve for unearned premiums .....		42.50
		115.90
Revised net income (loss).....		5.29

“Item (2) is covered by a claim for refund, but items (3) and (4) are not covered by a claim and the statutory period for filing further claims has expired.

	“1925	xdollars
Net income as previously adjusted.....		128.30
Add:		
(1) Decrease in reserve for unearned premiums .....		27.47
(2) Furniture and fixtures disallowed as an expense .....		9.26
(3) Decrease in allowance of deduction for British taxes .....		4.17
		169.20
Deduct:		xdollars
(4) Head office expenses allowed... ..	74.73	
(5) Additional depreciation allowed ..	.69	75.42
		93.78
Revised net income .....		93.78

“Item (4) is covered by a claim for refund, but item (5) is not covered by a claim and the statutory period for filing further claims has expired.

“The question involved is stated as follows:

“May the deductions referred to above which are not covered by a claim be allowed legally as deductions from income (even though the statute of limitations for filing further claims has run) to the extent of the additions made to income, thus being allowed as offsets against the additions, although the statute

of limitations for levying additional assessments has run?

\* \* \* \* \*

“It is accordingly consistent and appropriate in the instant case to determine the correct income regardless of the statute of limitations. As the tax was paid upon the ‘net income as previously adjusted’, there should be subtracted therefrom the ‘revised net income’ to obtain the excess amount on which the tax was paid. Credit or refund may be made of the tax paid on so much of such excess amount as is covered by a timely claim. Therefore, on the basis of the figures for 1923, the credit or refund may be calculated as follows:

	x dollars
Net income as previously adjusted.....	83.60
Revised net income .....	0.00
	<hr/>
Income on which excess tax was paid.....	83.60
Income, the tax on which is covered by a claim	72.48
	<hr/>
Income, the tax on which is not covered by a claim .....	11.12

“Since the amount of income on which excess tax was paid, 83.60x dollars, exceeds the amount of income the tax on which is covered by the claim, 72.48x dollars, the tax paid on the latter amount may be credited or refunded. The tax paid on 11.12x dollars, not covered by a timely claim, may not be refunded or credited.



“The calculation on the basis of the figures shown for 1925 is as follows:

	x dollars
Net income as previously adjusted.....	128.30
Revised net income .....	93.78
	<hr/>
Income on which excess tax was paid.....	34.52
Income, the tax on which is covered by a claim	74.73

“Since the amount covered by a claim, 74.73 x dollars, exceeds the amount on which excess tax was paid, 34.52x dollars, the tax on the latter amount may be credited or refunded.” (C. B. X-2, pp. 272-3.)

Illustrating the present case in the same form, we have the following result:

Net income as disclosed by return (R. 11) . \$121,593.86  
Add:

- (1) Unallowable deductions and additional income—\$9,431.67 shown in 90 day letter (R. 11) less \$7,828.51 as stipulated (R. 25)..... 1,603.16

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\$123,197.02

Deduct:

- (2) Stamp taxes paid (R. 13) ..... \$ 7,219.29
- (3) Broker's selling commissions (R. 24) ..... 23,692.00      30,911.29

Revised net income ..... \$ 92,285.73

Item (2) is covered by a claim for refund, but item (3) is not covered by a claim, and the statutory period for filing further claims has expired.

The tax was paid on the income disclosed by the return, so, in accordance with G. C. M. 9800, "there should be subtracted therefrom the 'revised net income' to obtain the excess amount on which the tax was paid".

Net income as disclosed by return.....	\$121,593.86
Revised net income .....	92,285.73

Income on which excess tax was paid.....	\$ 29,308.13
Income, the tax on which is covered by a claim .....	7,219.29

Income, the tax on which is not covered by a claim.....	\$ 22,088.84
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Paraphrasing G. C. M. 9800, since the amount of income on which excess tax was paid, \$29,308.13, exceeds the amount of income the tax on which is covered by the claim, \$7,219.29, the tax paid on the latter amount may be credited or refunded. The tax paid on \$22,088.84, not covered by a timely claim, may not be refunded or credited.

It is submitted the application of G. C. M. 9800 demonstrates that petitioner is entitled to a refund of the full amount of income tax paid by reason of the failure to claim a deduction for the stamp taxes covered by the valid and timely claim for refund.

SAME RESULT ATTAINS FROM APPLICATION OF SECTION  
322 (d) INTERNAL REVENUE CODE.

As was pointed out in petitioner's opening brief, section 322 (d) of the Internal Revenue Code requires the Board, if it "finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax, \* \* \* to determine the amount of such overpayment", viz., in the present case \$15,-122.56. The section then requires the credit or refund of such portion of the tax as was paid within three years before the filing of the claim, which literally would be \$9,474.40 in this case. Petitioner, however, concedes, for the purpose of this review, that there is an additional limitation on the credit or refund to the amount covered by the claim when it is less than the portion of the tax paid within the three years, viz., \$4,087.61.

It is submitted the decision of the Board should be reversed with directions to allow petitioner a refund of the full amount covered by his claim.

Dated, San Francisco,  
February 19, 1941.

Respectfully submitted,

WALTER SLACK,

*Attorney for Petitioner.*

